



## **OFFICE OF MANAGEMENT AND BUDGET**

### **Request for Public Comments: Interagency Review of Exclusion Order Enforcement**

#### **Process**

**AGENCY:** Office of the U.S. Intellectual Property Enforcement Coordinator, Executive Office of the President.

**ACTION:** Request for written submissions from the public.

**SUMMARY:** The Executive Office of the President, through the U.S. Intellectual Property Enforcement Coordinator (“IPEC”), is beginning an interagency review directed at strengthening the procedures and practices used during enforcement of exclusion orders issued by the U.S. International Trade Commission (“ITC”). The interagency working group will review existing procedures that U.S. Customs and Border Protection (“CBP”) and the ITC use to evaluate the scope of exclusion orders and work to ensure the process and criteria utilized during exclusion order enforcement activities are transparent, effective, and efficient. Through this request for public comment, IPEC invites public input and recommendations in support of the Administration’s interagency review of exclusion order enforcement processes called for by the 2013 Joint Strategic Plan on Intellectual Property Enforcement [and the White House Task Force on High-Tech Patents].

**DATES:** Submissions must be received on or before July 21, 2013, at 11:59 p.m.

**ADDRESSES:** All submissions should be electronically submitted to

<http://www.regulations.gov>. If you are unable to provide submissions to [regulations.gov](http://www.regulations.gov), you may contact the Office of the U.S. Intellectual Property Enforcement Coordinator at

intellectualproperty@omb.eop.gov using the subject line “IPEC Review of Exclusion Order Enforcement Processes” or (202) 395-1808 to arrange for an alternate method of transmission. The regulations.gov website is a Federal E-Government website that allows the public to find, review and submit comments on documents that have published in the Federal Register and that are open for comment. Submissions filed via the regulations.gov website will be available to the public for review and inspection. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary business information.

**FOR FURTHER INFORMATION CONTACT:** Office of the U.S. Intellectual Property Enforcement Coordinator, at intellectualproperty@omb.eop.gov or (202) 395-1808.

**SUPPLEMENTARY INFORMATION:** Under Section 337 of the Tariff Act of 1930, the ITC investigates allegations regarding unfair practices in import trade, including allegations related to intellectual property infringement, as well as other forms of unfair competition. Once the ITC finds a violation of Section 337 and issues an exclusion order barring the importation of infringing goods, CBP and the ITC are responsible for determining whether imported articles fall within the scope of the exclusion order. Because of these shared responsibilities, it is critical that the ITC and CBP have clear communication on what the order means to improve the order’s enforcement and prevent importation of infringing product. This determination can often be challenging, particularly in cases in which a technologically sophisticated product may have been redesigned so as to no longer fall within the scope of the existing exclusion order.

IPEC will chair a new interagency effort directed at strengthening the processes that CBP uses with regard to enforcement of ITC exclusion orders pertaining to intellectual property. The

working group will be comprised of representatives from the ITC; DHS, DOC, Treasury, and DOJ; offices within the Executive Office of the President including USTR, OSTP, NEC; and other relevant agencies as necessary.

The interagency working group will review existing procedures that CBP and the ITC use to evaluate the scope of ITC exclusion orders and work to ensure the process and standards utilized during exclusion order enforcement activities are transparent, effective, and efficient. Among others, one focus of the interagency review will be on ensuring that CBP uses transparent and accurate procedures for determining whether an article is covered by the ITC exclusion order. Further, the working group will evaluate opportunities to improve the effectiveness of directions provided by the ITC to assist CBP with the challenges of enforcement.

Important to the development of the Administration's exclusion order enforcement recommendations, is ensuring that any approaches that are considered to be particularly effective as well as any concerns with the present approach to exclusion order enforcement are understood by policymakers. As such, IPEC is seeking public input and recommendations through the questions set out below for improvements to the process and criteria utilized during exclusion order enforcement activities. Recommendations should include, but need not be limited to: changes to agency policies, practices or methods, guidance and regulation.

Within six months of the issuance of the Administration's 2013 Joint Strategic Plan on Intellectual Property Enforcement, the interagency working group will prepare recommendations.

## Questions

1. Please describe your, positive or negative, experience with the exclusion order enforcement processes.
2. Are the procedures, criteria, and regulations utilized by CBP when enforcing exclusion orders clear, accessible, and understood?
  - a. Please provide recommendations for enhancements to procedures, criteria, and regulations used during enforcement of exclusion orders?
3. Are the procedures and criteria used by CBP to evaluate the scope of an exclusion order effective and clearly understood?
  - a. If not, please provide a description of the problem experienced?
  - b. What improvements could be made to the procedures and criteria used by CBP when evaluating the scope of an exclusion order to assist with the determining whether an import is covered by the claims of the infringing patent?
  - c. Under CBP's current ruling request process, 19 CFR 177, an importer may seek a prospective ruling on whether a redesigned or new product falls within the scope of an exclusion order. Determinations of this kind are often initiated at the request of the importer (typically the product manufacturer) and are conducted through *ex parte* proceeding. Would development of an *inter partes* proceeding involving relevant parties to the ITC investigation enhance the efficiency, transparency and efficacy of the exclusion order enforcement process with respect to determining the scope of the exclusion order?
4. Are the processes used by CBP timely and effective in notifying interested parties, for example, ITC litigants, importers and the general public, of determinations made

regarding the scope of an exclusion order and, in turn, applicability to the imported product?

5. What further procedural changes or collaborative steps could be undertaken between the ITC and CBP to improve the efficacy of exclusion order enforcement efforts?
6. Do exclusion orders currently provide sufficient level of detail and direction necessary to assist CBP with the challenges of enforcement?
7. Please identify any additional areas of consideration regarding improvements that could be undertaken by CBP or the ITC to further improve upon the exclusion order enforcement processes?

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